

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG MICHAEL SMITH,

Defendant-Appellant.

UNPUBLISHED

October 17, 2006

No. 264196

Alger Circuit Court

LC No. 05-001684-FC

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

In this case arising from an incident in April 2004, when defendant Craig Smith and Kyle Carr broke into Nelson Oil gas station, Smith appeals as of right from his jury convictions of breaking and entering a building with intent to commit larceny¹ and safe breaking.² The trial court sentenced Smith as a fourth-offense habitual offender³ to concurrent prison terms of 6 to 15 years for the breaking and entering conviction, and 11 to 20 years for the safe breaking conviction, with those sentences to be served consecutively to a sentence related to a parole violation. We affirm.

I. Prosecutorial Misconduct

A. Standard Of Review

Smith argues numerous acts of prosecutorial misconduct and admits that these alleged improper acts are unpreserved. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights.⁴

¹ MCL 750.110.

² MCL 750.531.

³ MCL 769.12.

⁴ *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

B. Curative Instruction

The prosecutor stated during closing argument that Smith knew that he was guilty but decided to exercise his constitutional right to trial and “role [sic] the dice and see what a jury will do for him.” The prosecutor’s statements were an improper attempt to discredit Smith for exercising his constitutional right to a trial. “The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.”⁵ But, while the remarks were improper, the trial court instructed the jury that the attorneys’ statements could not be used as evidence to decide Smith’s guilt or innocence. This instruction was sufficient to cure any prejudice⁶ because jurors are presumed to follow the instructions of the trial court.⁷ Further, as with all of Smith’s remaining alleged acts of prosecutorial misconduct (even if erroneous), this error could have also been cured by a contemporaneous curative instruction.⁸ Therefore, Smith was not denied a fair trial and is not entitled to relief on this issue.

C. Ineffective Assistance Of Counsel

Smith’s alternative argument of ineffective assistance of counsel for his defense counsel’s failure to object to the alleged acts of prosecutorial misconduct is unpreserved.⁹ Therefore, our review of Smith’s ineffective assistance of counsel claim is limited to errors apparent on the record.¹⁰ As concluded above, Smith was not denied a fair trial based on the alleged acts of prosecutorial misconduct. Therefore, Smith cannot sustain his claim of ineffective assistance of counsel for his defense counsel’s failure to object to those acts.¹¹

II. Right To Confrontation

A. Standard Of Review

Smith argues that the trial court improperly interfered with his constitutional right of confrontation by limiting the scope of cross-examination of a crucial prosecution witness, co-defendant Kyle Carr, concerning his alleged prior inconsistent statements and a possible bias on

⁵ *Grunewald v United States*, 353 US 391, 425; 77 S Ct 963; 1 L Ed 2d 931 (1957) (Black, J., concurring).

⁶ See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Long*, 246 Mich App 582, 587; 633 NW2d 843 (2001).

⁷ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

⁸ See *Stanaway*, *supra* at 687.

⁹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

¹⁰ *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

¹¹ *People v Bass (On Rehearing)*, 223 Mich App 241, 252; 581 NW2d 1, vacated in part on other grounds 457 Mich 866 (1997) (holding that the defense counsel’s failure to object to prosecutorial remarks that did not deny the defendant a fair trial did not amount to ineffective assistance of counsel).

behalf of the prosecution. Defense counsel argued below that the scope of Carr's cross-examination should not be limited, but he did not raise this constitutional argument below, making this issue unpreserved.¹² An unpreserved constitutional error may be considered on appeal if the alleged error was plain error that affected the defendant's substantial rights.¹³ "To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings. The defendant bears the burden of persuasion with respect to prejudice."¹⁴ Once the elements have been established, this Court maintains discretion in deciding whether to reverse.¹⁵

B. Limitation On Cross-Examination

We agree that it was plain error to limit the scope of cross-examination, but Smith has failed to establish that the error affected his substantial rights. A limitation on cross-examination preventing a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation.¹⁶ A defendant's right to cross-examine an informant regarding credibility issues includes "'any fact which might have influenced an informant's testimony.'"¹⁷ However, an error in limiting the scope of relevant cross-examination is subject to harmless error analysis.¹⁸

Here, defense counsel noted below that co-defendant Carr had incorrectly stated during the preliminary examination that he was not represented by counsel on July 21, 2004, the day he met with the prosecutor concerning a different case, and that he had already been sentenced on that day. Defense counsel also indicated that the written statement Carr made on that day might contain facts that he had no personal knowledge of because Carr's September 1, 2004, statement arguably indicated as much and argued that the prosecutor improperly influenced Carr to rewrite his July 21, 2004, statement. While the trial court reasoned that the proposed scope of cross-examination would divert the jury's attention and could require the prosecutor to become a witness, the above facts indicate, at least, that Carr may have testified untruthfully during the preliminary examination. Because Smith's right to cross-examine regarding credibility included

¹² *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

¹³ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

¹⁴ *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003) (internal citation omitted).

¹⁵ *Id.* at 355.

¹⁶ *Davis v Alaska*, 415 US 308, 317-318; 94 S Ct 1105; 39 L Ed 2d 347 (1974); *People v Mumford*, 183 Mich App 149, 153; 455 NW2d 51 (1990); *People v Holliday*, 144 Mich App 560, 566; 376 NW2d 154 (1985).

¹⁷ *Mumford*, *supra* at 152 (citation omitted, emphasis in *Mumford*).

¹⁸ *People v Morton*, 213 Mich App 331, 336; 539 NW2d 771 (1995).

any fact that may have affected Carr's testimony,¹⁹ we conclude that it was plain error to limit the scope of Carr's cross-examination.

While the prosecutor candidly admitted below that Carr's testimony was vital to this case, the plain error in limiting the scope of cross-examination did not affect Smith's substantial rights in light of the strong evidence of guilt. Specifically, Lieutenant Donald Nettleton testified that Ben Borowski named Carr and Smith as individuals involved in the Nelson Oil offense. And because Borowski testified at trial, the rule pronounced in *Crawford v Washington*,²⁰ and further explained in *Davis v Washington*,²¹ involving the Confrontation Clause and out-of-court testimonial statements from a witness who does not testify at trial is not implicated here. Moreover, Sergeant Jason Welch testified that the fingerprint removed from the scene matched Smith's right index finger. Therefore, given the evidence at trial, we conclude that Smith has failed to meet his burden of showing that the error affected his substantial rights.

III. Sentencing

Relying on *Blakely v Washington*,²² Smith argues that he is entitled to resentencing because the trial court violated his due process rights at sentencing when scoring Offense Variable 14, by considering facts that were neither proved beyond a reasonable doubt at trial nor admitted by Smith.²³ However, Smith's argument fails because *Blakely* does not apply to sentences imposed in Michigan that are, as in this case, below the statutory maximum.²⁴

Affirmed.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Michael R. Smolenski

¹⁹ *Mumford*, *supra* at 152.

²⁰ *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

²¹ *Davis v Washington*, ___ US __; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

²² *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

²³ After filing his claim of appeal, Smith filed a motion to remand, arguing that he was entitled to resentencing because the trial court's factual determination that he was the leader of the larceny for purposes of sentencing violated his right to a jury trial. This Court denied Smith's motion for failure to persuade this Court of the necessity of a remand at that time. *People v Smith*, unpublished order of the Court of Appeals, entered March 21, 2006 (Docket No. 264196).

²⁴ *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006).